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May 15, 2014

Sunshine Committee
Washington State Office of the Attorney General
PO Box 40100
Olympia, WA 98504

Dear Chairman Schwab and Committee Members:

The American Civil Liberties Union of Washington (ACLU) welcomes this opportunity to comment on two of the agenda items for the May 20 Sunshine Committee meeting. We are a statewide, non-partisan, non-profit organization with nearly 20,000 members, dedicated to the preservation and defense of constitutional and civil liberties. One of those civil liberties is the right of access to information about our government, necessary to allow public oversight of government workings. Another civil liberty is the right to personal privacy, and the right to control the dissemination of information about one's private life. When considering exemptions to our state's Public Records Act (PRA), it is necessary to strike a delicate balance between those two important liberties.

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Witness Identification

The ACLU believes that both public and private interests are best served by allowing witnesses, victims, and complainants to decide for themselves whether or not they wish their identities to be protected. Each person's circumstances are different, and only the person affected can decide what is best for those particular circumstances. Some victims and witnesses are happy to be publicly identified, but others reasonably fear that there will be adverse consequences if their identities are revealed. The existing language in RCW 42.56.240 recognizes that the victim's desire should govern disclosure or nondisclosure, but is unfortunately limited to choices made at the time a complaint is filed. As this committee knows, the ACLU believes that provision should be changed, to allow the victim to make that choice at any time. After all, in the stress existing right after an incident occurs, a person may well not think one way or the other about anonymity; it is only after things have calmed down that the person will worry about that.

We therefore generally support the current proposal to change RCW 42.56.240, since it does not limit the choice to the time the complaint is filed. We are concerned, however, that subsection (b) of the proposal may undermine the entire concept of individual choice, by overriding that choice if the person "has already been identified publicly." This provision is vague, unnecessary, and harmful. Especially in today's online world, with fragmented sources of information, it is unclear what it means to be "identified publicly." While perhaps identification in stories on all major news outlets qualifies, it is much less clear how to treat publication in a single weekly

newspaper, and even less clear how to treat publication on a web site—where readership varies between millions and just a handful of people. As noted by our Supreme Court in a similar situation,

> Under such a holding, agencies will be required to engage in an analysis of not just the contents of the report but the degree and scope of media coverage regarding the incident. Exactly how much media coverage is required before we will rule that an individual's right to privacy is lost? Agencies will be placed in the position of making a fact-specific inquiry with uncertain guidelines. If the agency incorrectly finds that there has been little media coverage and exempts from disclosure the identity of the subject of the report, the agency could face significant statutory penalties. … Denying the existence of a right to privacy on the basis of the extent of media coverage is likely to result in incorrect assessments and potentially significant costs to the agency.

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 414 (2011).

There is simply no point in subsection (b). If, in fact, the requester already knows the identity of the witness, then it doesn't harm the requester if the identity is redacted—the requester can simply fill in the blank. On the other hand, if the requester doesn't know the identity, harm could still result from disclosure, and the victim's choice should be honored. "Even though a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks. But just because some members of the public may already know the identity of the person in the report, it does not mean that an agency does not violate the person's right to privacy by confirming that knowledge through its production." *Id*.

911 Privacy Issues

We are uncertain exactly what is being proposed here, as no proposal is currently included in the meeting materials. Our understanding, however, is that the issue under consideration has to do with the databases of information used by 911 operators—and by "reverse 911" operations—to link phone numbers with addresses and personal information. We further understand that those databases used to be maintained by and housed within telecommunications companies, but now are instead housed by government agencies. With those understandings, the ACLU wholeheartedly supports the creation of an exemption from public disclosure for such databases.

This is an excellent example of the distinction between information *about* government and personal information *held by* government. Individuals' privacy should not be compromised simply because a government agency holds their information. In this instance, there is no advantage to public disclosure of those personal details; it will not in any way assist the public to oversee the functioning of 911 operations. Public disclosure will, however, undermine personal privacy. People are increasingly protective of their phone numbers, especially cell numbers, and the PRA should not be an end run around having unlisted numbers.

Some 911 systems are adding additional personal information, including medical information, to databases in order to better facilitate provision of emergency services to people with special needs. As this happens and personal information beyond names and addresses are added to 911 databases, the need for nondisclosure becomes even more apparent. We should never place Washingtonians in the position of having to choose between their privacy and their ability to obtain the best emergency service available.

The ACLU hopes that these comments will assist the Committee in its consideration of these two matters.

Sincerely,

Doug Klunder
Privacy Counsel